(3)

No. 89-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION and CERTAIN INDIVIDUAL MEMBERS THEREOF, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE, ROBERT L. PATTULLO, JR.; ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS; and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENT ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

I. THE AUDITOR GENERAL LACKS STANDING AS HE IS NOT A PERSON UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II. THE JUSTICES OF THE SUPREME COURT OF ILLINOIS CORRECTLY DETERMINED THAT RECUSAL WAS NOT NECESSARY.

III. THE ILLINOIS SUPREME COURT CORRECTLY INVOKED THE RULE OF NECESSITY WHERE RECUSAL WAS NOT WARRANTED AND SUBSTITUTION OF JUSTICES NOT AUTHORIZED BY THE ILLINOIS CONSTITUTION.

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RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. CONSTITUTIONAL PROVISIONS

United States Constitution

(a) United States Constitution amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(b) United States Constitution amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Illinois Constitution

(a) Ill. Const. art. II § 1

Sec. 1. Separation of Powers

The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

(b) Ill. Const. art. VIII § 3(a)

Sec. 3. State Audit and Auditor General

(a) the General Assembly shall provide by law for the audit of the obligation, receipt and use of public funds of the State. The General Assembly, by a vote of three-fifths of the members elected to each house, shall appoint an Auditor General and may remove him for cause by a similar vote. The Auditor General shall serve for a term of ten years. His compensation shall be established by law and shall not be diminished, but may be increased, to take effect during his term.

(c) Ill. Const. art. VIII § 3(b)

Sec. 3. State Audit and Auditor General

(b) The Auditor General shall conduct the audit of public funds of the State. He shall make additional reports and investigations as directed by the General Assembly. He shall report his findings and recommendations to the General Assembly and to the Governor.

(d) Ill. Const. art. VIII § 1(a)

Sec. 1. FINANCE - General Provisions

(a) Public funds, property or credit shall be used only for public purposes.

2. ILLINOIS SUPREME COURT RULES

(a) Ill. Rev. Stat. ch. 110A § 751(1)

751(1) (Supreme Court Rule 751). Attorney Registration and Disciplinary Commission

(a) Authority of the Commission. The registration of, and disciplinary proceedings affecting, members of the Illinois bar shall be under the administrative supervision of an Attorney Registration and Disciplinary Commission.

(b) Ill. Rev. Stat. ch. 110A § 751(e)(5)

751. (Supreme Court Rule 751). Attorney Registration and Disciplinary Commission

(e) Duties. The Commission shall have the following duties:

(5) to collect and administer the disciplinary fund provided for in Rule 755, and, on or before April 30 of each year, file with the court an accounting of the monies received and expended for disciplinary activities and a report of such activities for the previous calendar year. Such accounting and report shall be an independent annual audit of the disciplinary fund as directed by the court.

(c) Ill. Rev. Stat. ch. 110A § 752

752. (Supreme Court Rule 752). Administrator.

The Commission will appoint an Administrator of the registration and disciplinary system to serve at its pleasure as the principal executive officer of the registration and disciplinary system.

(d) Ill. Rev. Stat. ch. 110A § 753

753. (Supreme Court Rule 753). Inquiry, Hearing and Review Boards

(a) Inquiry Boards.

(2) The Board shall inquire into and investigate matters referred to it by the Administrator. The Board may also initiate investigations on its own motion and may refer matters to the Administrator for investigation.

(b) Filing a Complaint. A complaint voted by the Inquiry Board shall be prepared by the Administrator and filed with the Hearing Board. The complaint shall reasonably inform the attorney of the acts of misconduct he is alleged to have committed.

(c) Hearing Board.

(3) The hearing panels shall conduct hearings on complaints filed with the Board and on petitions referred to the Board. The panel shall make findings of fact and conclusions of fact and law, together with a recommendation for discipline, dismissal of the complaint or petition, or nondisciplinary suspension.

(5) Proceedings before the Board shall be conducted according to the practice in civil cases as modified by rules promulgated by the Commission pursuant to Rule 851(a).

(6) Except as other expressly provided in these rules, the standard of proof in all hearings shall be clear and convincing evidence.

(d) Review Board. There shall be a nine-member Review Board which shall be appointed by the court...

(e) Review Procedure.

(1) Reports of the Hearing Board shall be reviewed by the Review Board upon the filing of exceptions by either party.

(2) The parties shall not be entitled to oral argument before the Review Board as of right, but the Board may, in its discretion, permit or require briefs or oral arguments or both.

(3) The Review Board may approve the findings of the Hearing Board, may reject or modify such findings as it determines are not established by clear and convincing evidence, may make such additional findings as are established by clear and convincing evidence,...or may approve, refect or modify the recommendations, may dismiss the proceeding...

(6) The Administrator may petition the court for leave to file exceptions to the order or report of the Review Board.

(7) The parties shall not be entitled to oral argument before the court as of right, but the court may, in its discretion, permit or require briefs or oral argument or both...

(e) Ill. Rev. Stat. ch. 110A § 756.

756. (Supreme Court Rule 756. Registration and Fees.

(a) Annual Registration Required. Except as hereinafter provided, every attorney admitted to practice law in this State shall register and pay an annual registration fee to the Commission on or before the first day of January.

3. RELEVANT ILLINOIS STATUTORY PROVISIONS

(a) Ill. Rev. Stat. ch. 85 § 901 (1973)

Sec. 901. "Public funds" and "public agency" defined

The words "public funds", as used in this Act, mean current operational funds, special funds, interest and sinking funds, and funds of any kind or character belonging to or in the custody of any public agency.

The words "public agency", as used in Act, mean the State of Illinois, the various counties, townships, cities, towns, villages, school districts, special road districts, public water supply districts, fire protection districts, drainage districts, levee districts, sewer districts, housing authorities, and all other political corporations or subdivisions of the State of Illinois, now or hereafter created, whether herein specifically mentioned or not.

(b) Ill. Rev. Stat. ch. 15 § 301-7

STATE AUDITING ACT
Article VIII. General Provisions

301-7. State agencies

Sec. 1-7. "State agencies" means all officers, boards, commissions and agencies created by the Constitution, whether in the executive, legislative or judicial branch, but other than the circuit court; all officers, departments, boards, commissions, agencies, institutions, authorities, universities, bodies politic and corporate of the State; and administrative units or corporate outgrowths of the State government which are created by or pursuant to statute, other than units of local government and their offices, school districts and boards of election commissioners; all administrative units and corporate outgrowths of the above and as may be created by executive order of the Governor.

(c) Ill. Rev. Stat. ch. 15 § 301-2

301-2. Purpose and construction
Sec. 1-2. Purpose and construction

(a) This Act implements Article VIII, Section 3 of the Constitution , and shall be construed in furtherance of those provisions.

(b) This Act is intended to provide a comprehensive and thorough post audit of the obligation, expenditure, receipt

and use of public funds of the State under the direction and control of the Auditor General...

(c) This Act is intended to govern the Auditor General under the control and direction of the General Assembly. Neither the enactment of this Act nor any provision contained herein shall in any way derogate from the status of the Auditor General as a legislative officer of the State under the Constitution.

(d) Ill. Rev. Stat. ch. 15 § 301-13(c)

301-13. Financial audit or compliance audit

(a) whether the audited agency has obligated, expended, received and used public funds of the State in accordance with the purpose for which such funds have been appropriated or otherwise authorized by law;

(b) whether the audited agency has obligated, expended, received and used public funds of the State in accordance with any limitations, restrictions, conditions or mandatory directions imposed by law upon such obligation, expenditure, receipt or use;

(e) in the case of a local or private agency, whether the records, books and accounts of the audited agency fairly and accurately reflect its financial and fiscal operations relating to the obligation, receipt,

expenditures and use of public funds of the State to the extent such operations must be reviewed to complete post audit determinations under paragraphs (a) and (b) of this Section.

(e) Ill. Rev. Stat. ch. 15 § 303-1

AUDIT OF PUBLIC FUNDS 303-1. Jurisdiction of Auditor General

Sec. 3-1. Jurisdiction of Auditor General.

The Auditor General has jurisdiction over all State agencies to make post audits and investigations authorized by or under this Act or the Constitution.

(f) Ill. Rev. Stat. ch. 15 § 303-14

AUDIT OF PUBLIC FUNDS 303-14. Audit reports.

Sec. 3-14. Audit reports. Upon completion of any audit the Auditor General shall issue an audit report...

As part of this report the Auditor General shall prepare a signed digest of the legislatively significant matters of the report and, as may be applicable, a concise statement of (1) any actions taken or contemplated by persons or agencies subsequent to the completion of the audit but prior to the release of the report, which bear on matters in the report, (2) any actions the Auditor General considers

necessary or desirable, and (3) any other information the Auditor General deems useful to the General Assembly in order to understand or act on any matters presented in the audit.

The Auditor General shall submit a copy of each audit report to the Commission, the Governor, the Speaker and minority leader of the House of Representatives and the President and minority leader of the Senate...

(g) Ill. Rev. Stat. ch. 130 §7

Sec. 7. Treasurer to keep revenues, etc.

The State Treasurer shall receive the revenues and all other public moneys of the state, and all moneys authorized by law to be paid to him, and safely keep the same.

INTRODUCTION

For the sake of brevity, Respondent will not include sections in this brief for opinion below and jurisdiction. Respondent will address in Argument those portions of Petitioner's brief which Respondent considers inaccurate or inadequate.

STATEMENT OF THE CASE

Commencing in 1977, the Illinois Auditor General sought to perform an audit of the receipt and use of the funds administered by the Illinois Attorney Registration and Disciplinary Commission ("Commission") and State Board of Law Examiners ("Board"). The Auditor General has taken the position that the Commission and Board are state agencies and that the funds administered by each are public funds. The Commission and Board have determined that the Auditor

General has no authority to conduct any such audit as the Commission and Board are not state agencies and the funds administered by them are not public funds.

On July 26, 1982, the Chicago Bar Association filed in the Circuit Court of Cook County a complaint for declaratory relief against the Illinois Auditor General, the Commission and the Board seeking a declaration that the Illinois Constitution and applicable statutes do not authorize the Auditor General to conduct any audit of the funds of the Commission or Board. On May 4, 1984, the Commission and the Board were realigned as plaintiffs.[1]

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1 Petitioner's reckless reference to the reassignment of Judge Murray by the Supreme Court of Illinois is not only without factual basis but an affront to the Judiciary. Such statements typify the grandiose positions and arguments put forth below by Petitioner and warrant no consideration by this Court.

On April 21, 1987, the trial court issued its judgment order granting the plaintiff-appellees' motions for summary judgment and finding that the Auditor has no authority to audit as whether neither the Board nor Commission are state agencies in receipt of public funds.

On May 18, 1987, the Auditor filed a motion for reconsideration which was denied on July 17, 1987, and thereafter, filed his notice of appeal.

On May 18, 1989, the Appellate Court of Illinois, First Judicial District entered its judgment against Appellant-Petitioner. No party to the proceedings filed a petition for rehearing. Petitioner filed a petition for a Certificate of Importance in the Appellate Court on June 1, 1989.

On June 1, 1989, a Petition for Leave to Appeal was filed concurrently with a Verified Motion to Recuse and

Appoint Substitute Justices by Petitioner, in the Illinois Supreme Court. On July 27, 1989, the Illinois Supreme Court denied Petitioner's motion and petition.

On August 18, 1989, Petitioner filed a Petition for Rehearing and Reconsideration of Order Denying Verified Motion to Recuse and to Appoint Substitute Justices for this Cause and a Motion for Leave to Petition for Rehearing and Reconsideration of Order Denying Petition for Leave to Appeal (with suggestions conditionally attached). On August 29, 1989, the Illinois Supreme Court denied the petition for rehearing.

On November 27, 1989, Petitioner filed his Petition for Writ of Certiorari to the Illinois Supreme Court with the Clerk of the United States Supreme Court.

On November 27, 1989, Petitioner served Respondent with copies of his Petition for Writ of Certiorari filed with the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, Petitioner lacks standing as he is not a person under the Fourteenth Amendment to the United States Constitution. The term "person" within the Fourteenth Amendment does not include a state or one of its officials. Further, neither the Petitioner nor the Illinois taxpayers have an personal stake in the outcome of this matter, because the funds at issue below are not public monies. Therefore, Petitioner lacks

standing to maintain this action.

Second, the Justices of the Supreme Court of Illinois correctly determined that recusal was not warranted. The Petitioner has failed to demonstrate that recusal was necessary. Neither the Constitution, the Illinois Cannons of Judicial Conduct, nor the Illinois Code of Civil Procedure required the recusal of any Illinois Supreme Court Justice. Thus, the Petitioner's rights under the Fourteenth Amendment were not violated by the denial of his motion for recusal.

Finally, the Illinois Supreme Court correctly invoked the Rule of Necessity. Recusal was not warranted in the matter below. The Illinois Constitution makes no provision for the substitution of temporary justices to the Supreme Court of Illinois. Therefore, Petitioner's rights under the Fourteenth Amendment were not denied where the Supreme Court

of Illinois invoked the Rule of Necessity.

ARGUMENT

I

THE AUDITOR GENERAL LACKS STANDING AS HE IS NOT A PERSON UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Auditor General lacks standing to pursue his claim of a violation of due process rights. The term "person" within the Fourteenth Amendment to the United States Constitution does not include a state or one of its officials.

Petitioner's claim as set forth in footnote 10 of his petition, as to his standing to maintain this action must be rejected. The Auditor General has throughout this controversy acted, at all times, in his capacity as a legislative agent, not as a private citizen. As Petitioner stated, his authority as a legislative agent with respect to the

funds of the Attorney Registration and Disciplinary Commission and the State Board of Law Examiners has been determined conclusively below, and is not now at issue.

The Fourteenth Amendment to the United States Constitution mandates that no state shall "...deprive any person of life, liberty, or property without due process of law...." U.S. Const. amend. XIV, § 1. Whether the word "person" includes a state is dependent upon statutory construction and the environment in which the legislation was enacted and in common usage does not include a sovereign. Statutes employing the word "person" generally are contrued to exclude a sovereign. Will v. Michigan Department of State Police, 109 S.Ct. 2304, 2308 (1989); Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1979).

This Court has stated: "...The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." Shelley v. Kraemer, 334 U.S. 1 (1948). Clearly, the state is not a person within the scope of the protection of the Fourteenth Amendment. E.g., State of Wisconsin v. Zimmerman, 205 F.Supp. 673 (W.D. Wis. 1962).

It is the general rule that state officials acting within the scope of their official capacity do not have standing to maintain an action under the Fourteenth Amendment to the United States Constitution. E.g., Baxley v. Rutland, 409 F.Supp. 1249 (M.D. Ala. 1976); cf. Comment, An Attorney General's Standing Before The Supreme Court To Attack The Constitutionality of Legislation, 26 U.Chi.L.Rev. 624 (1959).

In Baxley, the Attorney General of Alabama, in his official capacity and as a relator of the state, attacked a state statute on the grounds that the statute violated the Fourteenth Amendment to the United States Constitution. Baxley, 409 F.Supp. 1249, 1250 (M.D. Ala. 1976). There, the Attorney General alleged that he was suing for the benefit of private persons, citizens, students, parents, and guardians. Baxley, 409 F.Supp. 1249, 1257 (M.D. Ala. 1976). The Court dismissed the action finding that the Attorney General lacked standing and the Court stated that it was incongruous for a state or state official to attack the validity of an enactment of its own legislature. Id.; cf. Yonkers Commission on Human Rights v. City of Yonkers, 654 F.Supp. 544, 553 (S.D. NY 1987) (a department which is an arm or agency of a unit of state government is not protected

by the Fourteenth Amendment against the acts of the state or other entities exercising state delegated authority).

While this Court has not directly determined whether a state is a "person" under the Fourteenth Amendment, it has held that a state is not a person under the language of the Due Process Clause of the Fifth Amendment of the United States Constitution. South Carolina v. Katzenbach, 383 U.S. 301 (1966). In Katzenbach, this Court rejected a claim by the state that the Due Process Clause of the Fifth Amendment extended to it under a claim of infringement arising out of the Voting Rights Act of 1965. Katzenbach, 383 U.S. 301, 324 (1966). There, this Court noted that "the word 'person' in the context of the due process clause of the Fifth Amendment cannot, by any reasonable mode of

interpretation, be expanded to encompass the States of the Union...." Katzenbach, 383 U.S. 301, 324 (1966).

Similarly, this Court has rejected the claim that the word "person" found in chapter 42 of the United States Code Section 1983, included the state. Will v. Michigan Department of State Police, 109 S.Ct. 2304, 2308-2309 (1989). This Court, in rejecting the claim, concluded that petitioner's construction of section 1983 "...as a remedy for official violations of federally protected rights, does no more than confirm that the section is directed against state action.... It does not suggest that the state itself was a person that Congress intended to subject to liability." Will, 109 S.Ct. 2304, 2310 (1989).

In Baker v. Carr, 369 U.S. 186 (1962), this Court stated that the gist of the question of standing was whether

"...the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions...." 369 U.S. 186, 204 (1962). The focus is "on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated...." Id.

Petitioner incorrectly argues, in footnote 10 of his Petition, that he has jus tertii standing to litigate on behalf of Illinois taxpayers regarding the "use of public moneys," under Article VIII, § 3 of the Illinois Constitution. Petitioner's argument must fail. To satisfy requirements of standing as a taxpayer, the taxpayer must show that he

has a personal stake in the outcome of the litigation. Frothingham v. Mellon, 262 U.S. 447 (1923).

Petitioner incorrectly cites Flast v. Cohen, 392 U.S. 83 (1968), in support of his jus tertii standing argument. In Flast, the taxpayers were granted standing to challenge the use of federal funds generated by tax monies. Flast, 392 U.S. 83, 85 (1968). There, the Court noted that each of the seven appellants had as a common attribute that "each pay[s] income taxes of the United States." Flast, 392 U.S. 83, 85 (1968). Such is not the case in this matter.

The nature of the funds of the Attorney Registration and Disciplinary Commission and the State Board of Legal Examiners was determined conclusively below not to be "public moneys." The taxpayers have no personal stake in the

funds, as "public moneys." Thus, Petitioner's claim must be rejected for lack of standing.

Moreover, Petitioner incorrectly cites Coleman v. Miller, 307 U.S. 433 (1939), for the proposition that Petitioner has an adequate stake in this matter by virtue of his duty to enforce state enactments. Petition at 11, n.10. In Coleman, this Court granted standing to public officials to challenge a state statute "the validity of which has been drawn in question." Coleman, 307 U.S. 433, 445 (1939)(emphasis added). Here, the validity of no statute is being questioned. Rather, the mere application of the statute was at issue below.

There can be no claim of denial of due process, either substantive or procedural, absent deprivation of either a liberty or property right. Eichman v. Indiana State University Board of

Trustees, 597 F.2d 1104 (7th Cir. 1979); Mensik v. Smith, 18 Ill.2d 572 , 166 N.E.2d 265 (1960). Tax and regulatory powers have been found not to be compensable property rights, but rather mere expectations. City of Saulte St. Marie, Mich. v. Andrus, 532 F.Supp. 157, 168 (D.C. 1980) (city, which is created by state legislature, is not "person" under the Fifth Amendment).

Petitioner has neither a personal stake nor a property interest in the outcome of this matter. The funds that were at issue in the proceeding are generated by attorneys' fees, not tax dollars. As such, Petitioner has no personal stake in this matter. Thus, Petitioner lacks standing to maintain this action.

II
THE JUSTICES OF THE SUPREME COURT OF ILLINOIS CORRECTLY DETERMINED THAT RECUSAL WAS NOT WARRANTED

The Auditor General's motion for recusal of four of the Justices of the Illinois Supreme Court was properly denied. Contrary to his argument, the Auditor General's rights under the due process clause of the Fourteenth Amendment to the United States Constitution have not been violated by previous decisions of the Supreme Court of Illinois related to his authority. See: Madden v. Cronson, 114 Ill.2d 504, 501 N.E.2d 1267 (1986), cert. denied, 484 U.S. 818 (1987).

Likewise, the Auditor General has failed to demonstrate any prejudgment of the issues by any Justice of the Illinois Supreme Court or prejudice towards him by that court which would necessitate recusal. Neither the Constitution, the

Illinois Cannons of Judicial Conduct, nor the Illinois Code of Civil Procedure required any Justice of the Illinois Supreme Court to recuse himself from the matter below.

It is presumed that "the law will not suppose a possibility of fear or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea." Aetna Life Insurance Company v. Lavoie, 475 U.S. 813, 820 (1986)(citing 3 W. Blackstone Commentaries (361)).

Statements by judicial officers which purport to show possible prejudgment of the issues, without some showing of additional interests, do not rise to the level of an infringement of due process rights. In fact, rarely do issues related to judicial disqualification, such as personal biases

or prejudices toward a party, rise to a constitutional level. Federal Trade Comm. v. Cement Institute, 333 U.S. 683, 702-703, rehearing denied, 334 U.S. 839 (1948). Aetna Life Insurance Company v. Lavoie, 475 U.S. 813 (1986).

Fundamental constitutional rights arising out of the Fourteenth Amendment cannot be violated by alleged prejudgment unless a judge has direct, personal, substantial and pecuniary interest in the pending matter. Aetna v. Lavoie, 106 S.Ct. 1580, 1586-88. While the Auditor recognizes that no such interest exists which could give rise to a violation of his due process rights, he suggests that the court extend the requirement of disqualification to a new area of "institutional interests." This case does not warrant such an extension and indeed the Auditor has not set forth any facts upon which such an extension should be

considered.

While the Auditor asserts that both the statements made by individual Justices and the dispositions reached by the Court in Cronson v. Attorney Registration and Disciplinary Commission, No. 57179 and in Madden v. Cronson, 114 Ill.2d 504, 561 N.E.2d 1267 (1986), cert. denied, 484 U.S. 818 (1987), support his theory of institutional interests and demonstrate prejudgment and prejudice, he has failed to put forth any specific evidence substantiating his assertions.

In Madden v. Cronson, supra, the Court specifically refrained from expressing any opinion as to whether the Auditor could audit the funds of the Commission and Board, noting the pendency of this matter. Likewise, the statements attributed to individual Justices in the Auditor's petition, do not express personal opinions, but merely express the

position of the Court in the exercise of its inherent authority to regulate the profession.

Nonetheless, entry of an adverse decision, standing alone, is not sufficient evidence to demonstrate prejudice necessitating recusal of a judge. Nehring v. First National Bank in DeKalb, 143 Ill.App.3d 791, 493 N.E.2d 1119, 1130 (2nd Dist. 1986)(referring to, City of Chicago v. Walker, 61 Ill.App.3d 1050, 1054, 377 N.E.2d 1214, 1217 (1st Dist. 1978)). Nor can facts learned by a judge in his judicial capacity be the basis for disqualification. United States v. Patrick, 542 F.2d 381 (7th Cir. 1976) (referring to, 287 U.S.C.A. § 455(b)(1) (1978)).

III

THE ILLINOIS SUPREME COURT CORRECTLY INVOKED THE RULE OF NECESSITY WHERE RECUSAL WAS NOT WARRANTED AND SUBSTITUTION OF JUSTICES IS NOT AUTHORIZED BY THE ILLINOIS CONSTITUTION

Petitioner asks this Court to readdress the standard for the Rule of Necessity previously articulated by this Court. This Court has recently stated that a judge has an absolute duty to hear and decide a matter, even if he has an interest, where no provision is made for substitution. United States v. Will, 449 U.S. 200 (1980).

In Will, this Court held that the court had properly chosen not to disqualify itself by invoking the Rule of Necessity, even where its decision directly benefited each member of the Court. Will, 449 U.S. 200, 217 (1980). There, this Court, refusing to alter the time-honored Rule of Necessity, stated that:

> [A] Court must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them.

Will, 449 U.S. 200, 216 (1980) (quoting Cohens v. Virginia, 6 Wheat. 264 (1821).

Petitioner incorrectly suggests that the Illinois Supreme Court was foreclosed from invoking the Rule of Necessity, because the Court was authorized to substitute justices. First, this assertion assumes that the justices were disqualified. Petitioner has made no

showing that the Court itself had a direct and substantial interest in the outcome of the litigation or that recusal was warranted.

Second, to deny jurisdiction based on the Rule of Necessity, some provision must be available to substitute a judge. Will, 449 U.S. 200, 214 (1980). As in Will, the Illinois Supreme Court, by necessity, had a duty to decide the matter before it. The authority to assign justices does not extend to the Supreme Court of Illinois when there is a full compliment of sitting justices. Perlman v. First National Bank of Chicago, 60 Ill.2d 529, 331 N.E.2d 65 (1975). Nor does the Illinois Constitution authorize the Supreme Court of Illinois to freely assign justices to replace temporarily recused justices. Ill.Const. Art. VI, § 16. Moreover, the Illinois Constitution makes no

provision for substituting a majority of the Court with other judges. Ill.Const. Art. VI, § 16. Consequently, if the Illinois Supreme Court had not invoked the Rule of Necessity, Petitioner would have been denied his constitutional right to have his matter adjudicated. Will, 499 U.S. 200, 217 (1980).

Finally, the Petitioner's request that substitute Justices be appointed is inconsistent with the decisions of the Illinois Supreme Court. Perlman v. First National Bank of Chicago, 60 Ill.2d 529, 331 N.E.2d 65 (1975). Where recusal has occurred and the constitutional requirement of four concurrances is an impossibility, the Appellate Court decision becomes the conclusive adjudication of the case but no precedential value then attaches. Perlman, 331 N.E.2d at 66.

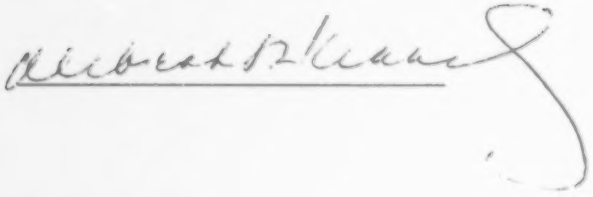
CONCLUSION

Petitioner has previously asserted his construction of the state constitution in an appropriate forum. His construction did not prevail. He now seeks to bootstrap his claim into federal court by arguing that he is acting as both a private citizen and a state official. The relief sought by Petitioner would create a forum by which state officials could challenge state legislative and constitutional schemes with which they do not agree. Such precedent would be overburdensome, unwarranted and is not a remedy envisioned by the United States Constitution or the Fourteenth Amendment to the Constitution.

For the reasons set forth above, Respondent, Attorney Registration and

Disciplinary Commission respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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